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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY ANTONIO CANO,

Defendant and Appellant.

E053347

(Super.Ct.No. FVA1000874)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed as modified.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jeffrey Antonio Cano pled guilty to one count of possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) The trial

court granted probation for a period of three years, subject to certain terms and conditions. On appeal, defendant argues that the court abused its discretion when it imposed a gang registration condition, since there was no evidence that the offense was gang related. The People concede, and we agree.

FACTUAL AND PROCEDURAL BACKGROUND¹

On June 3, 2010, a police officer conducted a traffic stop. Defendant was the driver of the car the officer stopped. Defendant consented to a search of his person. The officer found a clear plastic bag that contained what appeared to be marijuana, as well as 11 clear plastic baggies, in defendant's front pocket. The officer searched defendant's car and found a glass pipe with white residue on it. Defendant stated that he was an active gang member. The officer asked if he had any gang-related tattoos. When defendant took off his shirt to show his tattoos, the officer noticed a clear plastic baggie containing what appeared to be methamphetamine in his belly button. The officer took the baggie. The substance tested positive for amphetamines.

Defendant was arrested and charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 1), driving on a suspended license (Veh. Code, § 14601.2, subd. (a), count 2), possession of a smoking device (Health & Saf. Code, § 11364, subd. (a), count 3), possession of marijuana (Health & Saf. Code, § 11357, subd. (b), count 4), and false evidence of registration (Veh. Code, § 4462.5, count 5). He entered a plea agreement and pled guilty to count 1 in exchange for the dismissal of the

¹ The facts are taken from the probation officer's report.

remaining counts and a grant of probation for three years. At the sentencing hearing, defense counsel objected to some of the probation conditions recommended in the probation report, including the gang terms. Defense counsel expressly did not object to the term barring defendant from associating with known gang members. The prosecutor asked for some of the gang terms to be imposed, based on defendant's admitted gang membership. The court struck some of the gang terms and imposed others, including condition no. 29, which stated: "Register your address with the appropriate city or county law enforcement agency, pursuant to [Penal Code] section[s] 186.30/186.31 within ten (10) days from this date, and submit proof of current registration to the Probation Officer within thirty (30) days from this date" (the gang registration condition).²

ANALYSIS

The Gang Registration Condition Should Be Stricken

Defendant argues that the court abused its discretion when it imposed the gang registration condition, since there was no evidence that defendant's possession of methamphetamine was gang related. The People correctly concede.

"Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' [Citations] . . . [¶] However, the trial court's discretion in setting the conditions of probation is not unbounded." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

² We note that the probation officer's report and the court referred to this condition as term No. 29. However, the minute order referred to it as term No. 28.

Penal Code³ section 186.30, subdivision (a), provides that: “Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, . . . within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.”

Subdivision (b) provides: “Subdivision (a) shall apply to any person convicted in a criminal court . . . for any of the following offenses: [¶] (1) Subdivision (a) of Section 186.22. [¶] (2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true. [¶] (3) Any crime that the court finds is gang related at the time of sentencing or disposition.”

In this case, defendant should not have been required to register pursuant to section 186.30 because he was not a person described in subdivision (b). He was not convicted of participation in a criminal street gang (§ 186.22, subd. (a)), there was no true finding made that he committed a crime for the benefit of, or in association with, a criminal street gang (§ 186.22, subd. (b)), and the court did not find that his current offense was gang related at the time of sentencing. (§ 186.30.) Moreover, because of the guilty plea, there was no evidence from which the court could find that defendant’s crime was gang related, other than defendant’s admission of gang membership. However, “a *crime* may not be found gang related within the meaning of section 186.30 based solely upon the defendant’s criminal history and gang affiliations.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761.)

³ All further statutory references will be to the Penal Code, unless otherwise noted.

Therefore, the gang registration condition should be stricken.

DISPOSITION

The judgment is modified to strike the probation condition which states: “Register your address with the appropriate city or county law enforcement agency, pursuant to [Penal Code] section[s] 186.30/186.31 within ten (10) days from this date, and submit proof of current registration to the Probation Officer within thirty (30) days from this date.” In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.